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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999.

EARLENE POLYAK — Petitioner

vs

THE HONORABLE CHARLES BURSON; FRANK HULEN ESTATE; DORA LEE HULEN; WILMA LESNANSKY; THE HONORABLE JIM HAMILTON, CIRCUIT AND CHANCERY JUDGE; GERALD WILSON, CIRCUIT COURT CLERK; DALTON A. MOUNGER; AND GENEVA FRISBEE, CLERK AND MASTER; — Respondents

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On Petition for Writ of Certiorari
To The United States Court of Appeals
And The United States District Court
And The Courts of Tennessee
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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92pp

QUESTIONS PRESENTED

1. SHOULD THIS SUPREME COURT REVIEW THE COURT OF APPEALS SIXTH CIRCUIT DENIAL OF RIGHT OF APPEAL ON RES JUDICATA, OF DISTRICT COURT DISMISSAL OF CONSTITUTIONAL RIGHT OF JURY TRIAL ON RES JUDICATA, WHICH IS IN CONFLICT WITH STATE COURT OF LAST RESORT THAT THERE IS NO RES JUDICATA, AND NO FINAL ORDER IN STATE?

2. HAS THE COURT OF APPEALS SIXTH CIRCUIT AND STATE COURT OF LAST RESORT DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL AND FEDERAL JURISDICTION THAT HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS SUPREME COURT?

3. DOES THE COURT OF APPEALS INJUNCTION AFFIRM HOLDING OF PROPERTY FOR FIFTEEN YEARS FOR SALE AT PUBLIC AUCTION UNDER 35-5-101 TCA WITHOUT DUE PROCESS OF LAW FOR PUBLIC USE, WITHOUT ANY JUST COMPENSATION IN VIOLATION OF FIFTH AMENDMENT AND PETITIONER'S CIVIL RIGHTS?

4.IS THE STATE SALE AT PUBLIC AUCTION UNDER 35-5-101 et seq. IN VIOLATION OF THE FITH AMENDMENT AND THE CONSTITUTION?

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IN THE
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October Term, 1999

EARLENE POLYAK — Petitioner

v

THE HONORABLE CHARLES BURSON et al., — Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
And The United States District Court
For The Sixth Circuit

Petitioner prays for a Writ of Certiorari to issue to review the violation of federal civil and constitutional rights and laws, and, jurisdiction, without ever granting constitutional right of a jury trial in dismissal of all complaints in the District Court on res judicata, and denial of right of appeal in the Court of Appeals Sixth Circuit on res judicata, which conflicts state court of last resort that there is no res judicata and no final order,and Court of Appeals sanctions such a departure from the accepted and usual course of judicial proceedings by the lower court to call for an exercise of this Court's supervisory powers.

OPINIONS BELOW

The opinions of the United States Court of Appeals Sixth Circuit are set forth in the Appemdix A, and the opinions of the United States District Court, Middle District of Tennessee are set forth in Appendix B. The opinion of the Supreme Court,Court of Appeals Chancery and Circuit Courts of Lawrence County, Tennessee are set forth in Appendix C.

JURISDICTION

The jurisdiction of this Supreme Court is invoked in the order denying right of appeal and petition for rehearing to the District Court No. 1:98-0026 in the Court of Appeals No. 99-509, and this petition is with in ninety days there of October 15, 1999.

An extension of time has been granted until and through March 13,2000.

The appeal as a right was filed in the District Court No. 1:98-0026 dismissal on res judicata on March 30, 1999, and second time on April 2, 1999 .

The District Court issued second order of dismissal on June 9, 1999, which was appealed as a right amended to Court of Appeals No.99-512 and 99-513 at cost of $210.00, and both are still pending.

This Supreme Court has jurisdiction to review the opinion of the Supreme Court of Tennessee No. 01A 1-9803-CH-00133(Chancery No. 7951-96 and 7736-95 denied right of appeal on November 29, 1999, and pertinent orders of the lower courts.

The jurisdiction of this Supreme Court is invoked in Article III, sec. 2, which states that all judicial power shall extend to all cases of law and equity, between state and citizens of another state; and between citizens of different states.

The jurisdiction of the federal courts is exclussive in matters governed by the U.S. Constitution and Acts of Congress 28 U.S.C. 1332.

The jurisdiction of the federal courts extends to action taking place and amount in

over seventy-five thousand dollars.

This jurisdiction is further invoked in 28 U.S.C. 1441: 28 U.S.C. 1443((1) and (2); 28 U.S.C. 2101; 42 U.S.C. 1981, 1982, 1983, Civil Rights Act 1974, Civil rights Act 1991, and First, Fifth, Seventh, and Fourteenth Amendments and 28 U.S.C 2403 may apply.

CONSTITUTIONAL PROVISIONS

The pertinent portions of the First Amendment provides:

> Congress shall pass no law... abridging the freedom of speech, the right of the people to redress for grievances.
> U.S. Const.Amend. I.

The pertinent porvisions of the Fifth Amendment provides:

> No...person shall be deprived of life, liberty or property without due process of law; nor shall any private property be taken for public use, without just compensation.
> U.S. Const.Amend. V.

The pertinent provisions of the Seventh Amendment provides:

> ...where the value of controversy shall exceed twenty dollars, the right of a jury trial shall be preserved.
> U.S, Const. Amend. VII.

The pertinent portion of the Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property.

U.S. Const. Amend.XIV.

28 U.S.C.1443: Any of the following commenced in a state court may be removed by defendant to a district court.

> (1) Against any person who is denied or cannot enforce in the courts of such state law providing for equal civil rights of citizens of the United States.
>
> (2) For any act under the color of authority deprived from any law providing equal rights.

42 U.S.C. 1981:

> All persons within the jurisdiction of the United States shall have the same right to sue...to the full and equal benefits of all laws.

42 U.S.C. 1982:

> All persons in the United States shall have right in every state...th inherit purchase lease and convey real and personal property.

42 U.S.C. 1983:

> Every person who under the color of any statute, ordinance, regulation, custom,

> of the usage of any state...subject any citizen of the United States or other person within its jurisdiction thereto the deprivation of priveleges secured by the constitution and laws shall be liable in equity or other proper proceeding.

28 U.S.C. 2403:

> In any action where the constitutionality of a statute of a state affecting public interest is drawn into question.

29-27-117 Partition in Kind TCA:

> If exact partition cannot be made without material injury to the parties or some one of them,the commissioners may make the partitions as nearly equal as they can,and charge the larger shares the sums necessary to equalize all shares.

STATEMENT OF THE CASE

The Court of Appeals Sixth Circuit has denied right of appeal on all appeals on res judicata, including new cause and new case in District Court No. 1:98-0026 Complaint and Jury Trial Demand for constitutional right of a jury trial for the holding for fifteen(15) years of Petitioner's rights and investments dismissed on res judicata, in conflict with the decision of state court of last resort, that there is no res judicata, and no final order in denial of Petition for Rehearing 99-509(App.A.p.2).

The Court of Appeals denied right of appeal to dismissal of new cause and new case for holding retirement home for fifteen (15) years without constitutional right of jury trial dismissed by the District court on res judicata on June 22, 1999(App. A. p. 3).

This denial of appeal as a right on new cause and new case on res judicata, on old order of dismissal on res judicata Buford Evans & Sons v Earlene Polyak 92-5240(App. A. p. 5).

The Chief Deputy Clerk denied federal jurisdiction and due process of consideration by Judges for Petition for Rehearing En Banc, but holds ammended appeals Court of Appeals No. 99-512 and 99-513 (App. A. p. 4).

The court of Appeals denied injunction for Petition for Writ of Certiorari 99-152, pursuant to 28 U.S.C. 2101(f) on March 12, 1999 on old Evans v Polyak 92-5240(App.p.8)

The Clerk of the Supreme Court denied injunction grounded in Court of Appeals denial without taking before Justice of Supreme Court

App. A. p.).

The cases denied right of appeal by the Court of Appeals on res judicata dismissed in Complaint and demand for constitutional right of jury trial in District Court on res judicata were: Buford Evans & Sons v Earlene Polyak for payment of illegal entry and invalid charges; Earlene Polyak v William Boston, Boston Bates & Holt for division of loyalties and performance under Tennesse Professional Performance; Earlene Polyak v Jim Hamilton, Individually and in official capacity, and the District Court required Petitioner only to submit complaint under express permission.

Earlene Polyak v Thomas Stack and Henry, Henry & Stack for legal malpractice in bringing good and valid appeal back to Lawrence County No. 83-405-II. And appeal lost on UNAPPEALABLE JUDGMENT signed by Charles Holt, Boston Bates & Holt and the Honorable Jim Hamilton on December 20, 1983 .

The United States District Court denied Petitioner's Notice of Non-consent and objec-

tion to being subjected for the third time to the same Magistrate Judge. Magistrate dismissed Polyak v Boston Bates & Holt,1988, Dora Lee Hulen v Earlene Polyak District Court No. 1:96-0112 on res judicata(App. B.p. 28). (1996)

Three orders were appealed from District Court dismissals on res judicata in Magistrate Judge's Report and RecommendationNo.1:98-0026.

District Judge Altea A. Trauger dismissed No. 1:98-0026 on Magistrate Judge's Report and Recommendation res judicata on March 4, 1999 App. B. p. 17).

This dismissal on res judicata was appealed for one hundred ($105.00) to Court of Appeal No. 99-509.

Judge Trauger's order included a stipulation that Order would be final on Magistrate Judge's order, which appeal was amended to Court of Appeals for second $105.00 99-512.

Judge Trauger issued a third order on June 9, 1999 to Petitioner's objection to Report and Recommendation ,which original was amended and appealed to Court of Appeals No. 99-513.

There are no orders on 99-512 and 99-513 which are delayed in the Court of Appeal to copy (App. B.p. 20).

Dalton Mounger counsel filed Dora Lee Hulen and Wilma Lesnansky v Earlene Polyak Chancery No. 7951-96 on May 10, 1996. This is the third complaint filed against Petitioner by these parties to sell her retirement home at public auction without any just compensation.

Petitioner counterclaimed this complaint in U.S. District Court No. 1:96-0112. The same Magistrate Judge dismissed this complaint and District Judge remanded back to Chancery Court.

At this time, Dalton Mounger filed a motion for a hearing on January 30, 1998, for February 10, 1998, without due process of service on Petitioner and Judge Hamilton entered four orders, in her absence Feb.10,1998.

But Petitioner had filed complaint and jury trial demand District Court No. 1:98-0026 on February 12, 1998 ,in U.S. District Court.

Petitioner removed four orders again and amended 1:98-0026 to add orders and parties in

District Court No. 1:98-0026 on February 24, 1998 to new cause new case filed Feb.12,1998.

The counterclaim Dist. No. 1:96-0112 was appealed to Court of Appeals No.97-508 1/17/97.

The orders added to the amended District Court No. were: 7951-96 Dismissal of Counterclaim(App. C.p.43); Judgement on the Pleadings (App. C.p.44). Order for Sale (App.C.p.45), and CC:452-98(App. C.p.47).

The parties added were: The Honorable Jim Hamilton,Circuit and Chancery Judge; Gerald Wilson, Circuit Court Clerk; Dalton M. Mounger; and Geneva Frisbee Clerk and Master.

Petitioner was denied due process of service by the above parties, and Geneva Frisbee C&M did not serve Petitioner with Special Commissioner order, which was found later (App. C.p.46).

The Magistrate Judge acted upon these orders in Report and Recommendation with dismissal on res judicata (App. C.p. 21-36).He did not remand back to Chancery or Circuit Courts while counterclaim to 1:96-0112 was

pending in the Court of Appeals from January 17, 1997 though March 10, 1998.

Petitioner's Complaint and Demand for a Jury Trial for constitutional right of a jury for relief in damages and house and lot about ten(10) acres Chancery No. 7736-95 was pending in the Court of Appeals of Tennessee.

The District Court denied stay of sale on March 13, 1998(App. B. p.37).

The Court of Appeals of Tennessee granted improvident stay of sale on March 13, 1998, which means that Court may have made a mistake

The Court of Appeals consolidated 7951-96 with pending 7736-95 in 01A01-9803-CH-00133 App.C.p.51).

The Rena Hulen Estate was divided in settlement by agreement in January 1976, and was in division for seven(7) years.

Frank Hulen divided adding acreage back of house to his own farm, Wilma Lesnansky getting acreage to north east for her son to build,and Petitioner getting old farmhouse and lot in front about ten (10) acres.

This property remained in division with each party in possession of their agreed partition for seven (7) years(possession under the Tennessee law), but Frank Hulen stated that he wanted property sold at auction so "his kids could buy it" in 1983. including her partition.

During seven(7) years Petitioner worked and invested money in little old house on her agreed partition and restored for a retirement home. Frank Hulen and Lesnansky paid no money.

Defendants Hulen and Lesnansky have submitted third complaint to sell at public auction on wife of Frank Hulen May 10,1996.

Second complaint was submitted by Robert Boston, son of William Boston, Bates & Holt in September 1987. Robert Boston did not notify Petitioner of date time or place of auction, amount of proceeds,or where order entered for right of appeal,and right of redemption.

But local resident made affidavit to the notice of sale in Local Advocate in 1987.

First complaint to sell at public auction was filed by William Boston, Boston Bates &

Holt.

Petitioner filed second amended complaint demanding a return of $690.00 from Buford Evans owed by Frank Hulen and Wilma Lesnansky for illegal survey in 1983.

Petitioner included second issue against Gerald Wilson Circuit Court Clerk for obstructing her from getting papers and coercing her to pay $690.00 for Evans et al to prevent the Lawrence County Sheriff from taking her car and putting disabled husband on crutches on street, and added these parties to 1:98-0026 in violation of right to travel First A.

Petitioner complained to set aside any leins on her individual property for award of fund to Robert Boston,Boston Bates & Holt and added these parties to 1:98-0026.

Petitioner counter claimed Dalton Mounger for denial of due process and holding hearing without her for legal malpractice, but none of the above summons were served by the District Court for service. Petitioner does not have any expertise or knowledge in law.

ARGUMENT

THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DENIAL OF APPEAL AS A RIGHT ON RES JUDICATA, AND SANCTIONED THE DEPARTURE OF THE DISTRICT COURT DISMISSALS OF CONSTITUTIONAL RIGHT OF A JURY TRIAL ON RES JUDICATA, TO CALL FOR AN EXERCISE OF THIS COURT's SUPERVISORY POWERS

1. THE COURT OF APPEALS SIXTH CIRCUIT DENIAL OF APPEAL AS A RIGHT ON RES JUDICATA, OF DISMISSAL OF CONSTI - IONAL RIGHT OF JURY TRIAL ON RES JUDICATA, IS IN CONFLICT WITH STATE COURT OF LAST RESORT DECISION THAT THERE IS NO RES JUDICATA AND THERE IS NO FINAL ORDER IN STATE COURT

The Court of Appeals Sixth Circuit denial of Appeal as a Right Fed. R.App. 3, on res judicata in No. 99-509,and Petition for rehear ing to appeal as a right to District Court 1: 98-0026, for constitutional right of jury trial for rights and investments held fifteen(15) years on res judicata conflicts with Court of Appeals of Tennessee that there is no res judi cata, and there is no final order in state.

This new cause and new case No.1:98-0026

for compensatory and punitive damages for holding rights and investments without equal and whole enjoyment of properties in violation of right of redress of grievances in First, due process of any just compensation Fifth, constitutional right of a jury trial Seventh, and equal treatment under 29-27-117 Partition in Kind TCA in Fourteenth,federal and civil rights and laws was filed on February 12, 1998

Petitioner removed Chancery orders under 28 U.S.C. 1441 and amended 1:98-0026 and added parties in 7951-96; Dismissal of counterclaim; Judgment on the Pleading and Order of Sale and Circuit Court No. CC:452-98 on February 24, 1998. The Magistrate Judge included all of these orders in Report and Recommendation on December 11, 1998, order March 4, 1999.

Petitioner filed appeal as a right on April 7, 1999, and amended two times at cost of two hundred ten($210.00) dollars to the Court of Appeals 99-509,99-512,99-513.

The Magistrate Judge dismissed 1:98-0026 civil case and supported with criminal case

in revocation of parole in Canton, Ohio(1985).

The District Court has dismissed all of Petitioner's complaints and demands for jury trial for relief in damage on res judicata alleging issues could have been raised in Lawrence County, Tennessee in 1976,as follows:

The res judicata doctrine bars parties from relitigating issues that were or could have been raised in that action.Allen v MCurry 449 U.S. 90 94 101 S Ct 411, 66 L Ed 2d 308 (1980).Property divided as agreed until 1983.

The Magistrate Judge alleges collertal estopell and that two branches ofres judicata, but argument is in error in that both alleged branches require a final judgment.

> Under claim preclusion branch, an earlier final judgment on merits precludes party from raising an issue in litigation that should have been advanced in an earlier proceeding.
>
> Under issue preclusion branch, parties precluded from relitigation an issue of law which was necessarily decided on a previous final judgment. City o' Canton Ohio, 766 F 2d 236 238(6th Cir. 1985).

This argument conflicts with state court, Supreme Court and Eleventh Circuit rulings.

The District Court's argument supported by Sixth Circuit ruling conflicts with U.S. Court of Appeals Eleventh Circuit in the four elements necessary for res judicata:

> (1) There must be a final judgment (2) there must be a Court of competent juris diction, (3) parties those in privy with must be identical in both cases, and (4) must involve the same cause of action. T.A. Durham Inc., v Jefferson National Bank, 793 S.W. 2d 1541(11th Cir. 1986).

1.The Magistrate Judge's argument conflict with the Eleventh Circuit ruling and the Supreme Court ruling that only final judgment is res judicata.

> The supreme Court has stated it is "familiar law" that only final judgment is res judicata. G&S Merriman Co. v Saafield, 241 U.S. 22 28, 36 S Ct 277,60 L Ed 858(1916).

2.The Report and Recommendation was enter by the same Magistrate Judge, who had adversley ruled against pro se litigant for third time,and against second Notice of Nonsuit.

> You should be aware that your decision to consent, or not to consent, is entirely voluntary and should be indicated by cousel endorsing the attached consent form for plaintiff,and defendants. 28 U.S.C. 636 (b) and Fed. R. Civ P. 73.

3.The parties are not in privy in third lawsuit and Dora Lee Haddock Hulen does not have"successive to the same right" as Petitioner to Rena Hulen Estate. Black's Law Cpy. 1991, West Publishing Company.

Counsel Dalton Mounger(herein Mounger) filed complaint to sell Rena Hulen Estate at Public Auction on May 10, 1996, alleging that Frank Hulen named her heir 1:96-0112.

Frank Hulen does not hold a deed to any part of Rena Hulen Estate, and Petitioner has challenged the legality of this will wthout Notarization, only signature witnessed by relatives in CC:452-99 (10496).

> A declaratory judgment action cannot be maintained in any court where the question sought to be adjudicated can be properly made an issue in a suit that is pending. Becton v State,506 S.w. 2d 137 419 U.S. 847, 95 S Ct 83,42 L Ed 76(1974)

Mounger motioned for a hearing in Chancery Court on January 30, 1998, while Petitioner's counterclaim 1:96-0112 was pending in the Court of Appeals Sixth Circuit filed January 17, 1997, pending through March 10, 1998.

Mounger held hearing without notifying

and the Honorable Jim T. Hamilton ordered sale at public auction, while appeal pending in federal courts in violation of legal fiduciary duty and violation of due process by Mounger.

> One founded on trust or confidence reposed by one person on another.Black'sLaw (Supra).
>
> Due process of law implies the right of a person affected thereby to be present before the tribunal which pronounces judgment upon life, liberty or property Black's Law (Supra).

4. The case must involve the same cause of action, but 1:96-0112 filed by Mounger for Dora lee Haddock Hulen involved third complaint to sell Rena Hulen Estate at Public auction Chancery 7951-96 May 10,1996.

But four orders removed from Chancery Court and 1:98-0026 amended to add orders and parties on February 24, 1998 in U.S. Court.

> The attorney general was a proper party to a suit under declaratory judgment statute to have validity of law determined. Peters v O'Brien, 466 278 S.W. 660(1925).

Petitioner's constitutional right to a jury trial for rights and investments is supported by the Fifth Seventh and Fourteenth

Amendments. 29-27-117 Partition in Kind TCA.

> If exact partition cannot be made with out material injury to the parties or some one of them, the commissioners may make the partitions as nearly equal as they can, and charge the larger shares the sums necessary to equalize all shares.

Petitioner has been denied constitutional right to jury trial in state or federal courts before her rights and investments are sold at public auction in violation of due process of any just compensation and equal treatment under 29-27-117 Tennessee Code Annonated.

> Fourteenth Amendment protection of of property does not safeguard only rights of undisputed ownership, but also extends to protection to any significant property interest,including statutory entitlements. Feuntus v Shevin, (1972) 407 U.S. 92 S Ct 1983 32 L Ed 566.

The District Court is provided Rule 60(b) to set aside all misrepresentations by adverse parties Fraud(whether intrinsic or extrinsic) and misrepresentation by adverse parties FRciv P.

Rule 26 Exceptions to Res Judicata and Collateral Estopel Fed. R. Civ.P provides for relief in jury trial:

(d) the judgment in the first action was plainly inconsistent with a fair and equitable implementation of a statutory scheme.

(e) for reasons of substantive policy in cases involving a CONTINUING WRONG,the plaintiff if given option to sue from time to time.

2. THE COURT OF APPEALS SIXTH CIRCUIT AND THE STATE COURT OF LAST RESORT HAS DECIDED AND IMPORTANT QUESTION OF FEDERAL JURISDICTION THAT SHOULD BE DECIDED BY THIS SUPREME COURT

Petitioner filed complaint and jury trial demand for relief in compensatory and punitive damages for state court holding rights investments, and interests in investments for fifteen (15) years, without whole and equal enjoyment in her properties in U.S. District Court on February 12, 1998 1:98-0026.

Petitioner removed and amended 1:98-0026 under 28 U.S.C. 1441 with orders: 7951-96 Dismissal of Counterclaim; 7951-96 Judgment on the Pleadings; 7951-96 Order for Sale,from Chancery Court, and Circuit court No. CC:452-98, added parties The Honorable Jim Hamilton, Circuit and Chancery Judge;Gerald Wilson, Cir-Court Court Clerk; Dalton Mounger; and Geneva

Frisbee, Clerk & Master.

On February 10, 1998, the above parties participated in a hearing in which Petitioner had not been given due process of notification and defendant was not present 28 U.S.C. 1443.

(1) ...was denied and cannot enforce in state court under 29-27-117 TCA providing for equal civil rights.

(2) For any act under the color of author ity deprived from any law providing for equal rights.

Petitioner filed District Court 1:98-0026 for the constitutional right of jury trial in matter governed by the constitution Article III sec.2, between a state and citizens of another state:between citizens of different states,and under Act of Congress 28 U.S.C. 1332 Diversity of Citizenship in which federal courts have jurisdiction over state courts.

...as to matters governed by the U.S. Constitution and Acts of Congress...304 U.S. 46 58 S Ct 817 82 L Ed 1188.

Erie Railroad v Tompkin requires federal court to give some equitable remedies in diversity case, the only qualification being that federal court have power to grant relief.Erie Railroad v Tompkin, Moores K.F. 8716.5M 661

Both the District Court and the Court of Appeals of Tennessee rule on the constitutional question of jurisdiction and acts of congress which should be decided in this Court.

The District Court goes into and extensive discussion dismissing all cases on res judicata in the Amended 1:98-0026 including Frank Hulen Estate, Dora lee Hulen, Wilma Lesnansky and Dalton Mounger and sanction pro se.

The District Court adds Wilson and Frisbee dismissal of issues on res judicata98-0026.

The District Court dismisses Walkup(Petitioner's mistake Burson), the Governor of Tennessee parties which are served pursuant to FRcivP,and issues 1:98-0026.

Then dismiss Judge Jim Hamilton and sanction pro se litigant for filing complaint for constitutional right to properties 1:98-0026.

The Court of Appeals of Tennessee issued an improvident stay after Petitioner paid five thousand ($5000.00) +($1000.00) =($6000.00). She learned that improvident stay meant they may have made a mistake in taking jurisdiction.

The Court of Appeals of Tennessee did not grant Rule 36 Relief;Effect of Error.

> The ...Court of appeals...shall grant the relief on the law and facts to which the party is entitled or the proceeding other wise requires and may grant any relief, including giving of any judgment and making of any law... T.R.A.P.

The Advisory comments include ...denied effective counsel, or the"decision maker was obviously biased.Court did not granc any relief

Petitioner would qualify for relief as two lawyers ineffictive counsel and the decision maker was obviously biased.(See App C.p.56)

Judge Hamilton has denied all Petitioners motions to recusal from her cases, but the Court remanded back to Chancery Court. The Supreme Court of Tennessee denies appeal, and Court of Appeals holds petition for Judge Hamilton to recusal to Supreme Court of Tennessee 28USC 144

> Congress intended 1983 to be independent protection for federal rights and there is nothing to suggest that Congress inted ed to expand the common-law doctrine of judicial immunity to insulate the state judge completely from federal collateral review. United States vDetroit, 200 U.S. 321 327 26 S Ct 282 287 50 L Ed 499

This remand back to Chancery Court adverse,

> Appellant's do not contend that state officials are immune from suits to restrain unconstitutional acts undertaken in their official capacities. The law clearly recognizes the right of an interested party to force state officials to act in accordance with the constitution. Jordon v Gilligan, 500 F 2d 701 705(6th Cir. 1974). and 28 U.S.C. 144:
>
> Whenever a party at any proceeding in a district court makes a timely affidavit that a judge before whom a matter is pending has a personal bias against him or in favor of a party, Judge shall proceed no further, but another Judge shall be assigned to hear proceeding.

Petitioner submitted all complaints to U.S. District Court properly pursuant to Judge Wiseman order for express permission of Court.

Petitioner submitted all appeals to the U.S. Court of Appeals worded pursuant to their injunction with a copy of injunction attached.

This Supreme Court should decide the federal jurisdiction in this case 1:98-0026.

3. THE COURT OF APPEALS SIXTH CIRCUIT INJUNCTION AFFIRMING PUBLIC AUCTION SALE 35-5-101 TCA IS IN VIOLATION OF FIFTH,FOURTEENTH AMENDMENTS AND PETITIONER'S CIVIL RIGHTS

The court of Appeals denial of Right of Appeal FRAP 3 with injunction 1993 in new cause and new case No. 1:98-0026 affirms

public auction sale 35-5-101 et seq. TCA in denial of due process to Petitioner's absence at hearing on February 10, 1998, and deprives her of property in violation of the Fifth and Fourteenth, without constitutional right of a jury trial Seventh,and to petition government for redress of First, and violate civil rights.

The sale at public auction takes Petitioner's private property for sale at public auction for public use of public sale for the benefit of public,for bond in Chancery Court one thousand ($1000.00) dollars,cost to her of lawyer ($5000.00) dollars in Chancery Court, attorney fees, cost to Appellant Auctioner ($1,542,30) and other public benefits of sale.

This Special Commissioner advertised sale in local Advocate in violation of TCA requirment a paper of general circulation, sale must be held open ten (10) days TCA, but "sale will not be held open for advancement of bid" to be final on day of sale in violation of 35-5-101.

...appellant can consider the fact of in-

sufficient advertising in connection with other facts of case determning why land did not bring adequate price. Napier v Stone,21 Tenn App. 114 626 S.W.2d(1937).

Sale of land for which mortagor had paid $450 was set aside where sale was unadvertised and ccnsideration was only &117 (Supra).

It is assumed that rule in Tennessee is that strict foreclosure is valid if fully supported by every condition when there is nc provision for personal service and no redemption permitted.Highbee v Chadwick 22 873(1915).

The Court of Appeals Sixth Circuit denial of right of appeal on res judicata of District Court dismissals on res judicata affirming Tenn essee public auction sale in violation of Petitioner's civil rights conflicts with other courts and Supreme Court's rulings.

The Court held that notice of condemnation proceedings published in local newspaper was inadequate means of informing land owner whose name was known to city.Walker v Hutchington, 352 U.S. 112,77 S Ct 200 L Ed 178(1955).

The Honorable James Weatherford divided land between grandmother and children in Wayne County, and Judge Black divided land between sisters in Maury County 80-83 Phaler v Watson, under 29-27-117 TCA, but Petitioner's Civil

Rights discriminated against, the Constitution provides freedom from discrimination.

This Supreme Court ruled that"taking" of property unconstitutionally confisticates private property without just compensation "and these"basic rights of possessed interests"are set forth in Seawall v New York City, 544 N.Y. S. 2d 542(S Ct App. 1989).

In addition to denied to enjoy possessed interest, Petitioner has been obligated to pay telephone, electricity and Property taxes to date 1-30-2000 now seventeen(17) years, without constitutional right to water denying "whole and equal use of her investments"and without economically viable use of her property as in Situim vTahoe Regional Planning Agency, 117 S Ct 1659(1977).

This new cause an case involves yet another violation of her Civil Rights to travel by Circuit Court Clerk in Tennessee when she was obstructed,pushed,threatened and coerced to pay six hundred ($695.00) dollars to keep her car for her disabled World War II, disabled

husband off street on March 13, 1998 1:98-0026

> The right to travel embraces three different components: the right to enter and leave another state; the right to be treated as a welcome visitor while temporarily present in another state,... and th right to be treated like citizens of that state. Rita L. Saenz, California Director of Social Services et al., Petitioners Brenda Doe and Anna Doe etc.No. 98-97 1/13/1999 (S Ct Syllabus).

CONCLUSION

Petitioner prays that a Writ of Certiorari issue from this Supreme Court to review the denial of right of appeal on res judicata,and dismissal of complaints for constitutional right of a jury trial on res judicata District Court,and set aside of all orders for the constitutional right of a jury trial before a fair and just tribunal in U.S. District Court, Middle District of Tennessee.

Respectfully submitted,
Earlene Polyak
3179 Middlefield Drive
Trenton, Michigan 48183
(734) 676-3364

I certify that the above is true to the best of my belief and knowledge.

_____
Earlene Polyak

_____
NOTARY PUBLIC
Com'n expires:

CERTIFICATE OF SERVICE

I certify that a true copy of this petition for writ of certiorari has been mailed by United States Mail to Mary Byrd Ferrara Ass. Attorney General, 425 5th Ave. N.,Nashville, Tennessee 37243;Spicer,Flynn & Rudstrom,211 7th Ave. N,,Nashville, Tennessee 37219, and Dalton Mounger, 806A Garden St. P.O. Box 1468, Columbia, Tennessee 38402 on the _____day of_____2000.

_____
EARLENE POLYAK

APPENDIX A

In the United States Court of Appeals for the Sixth circuit Nos. 99-509, 99-512, 99-513.

Earlene Polyak v The Honorable Charles Burson; Frank Hulen Estate; Dora Lee Hulen; Wilma Lesnansky; The Honorable Jim Hamilton, Circuit and Chancery Judge; Jerald Wilson, Circuit Court Clerk; Dalton M. Mounger; and Geneva Frisbee, Clerk and Master; District Court No. 1:98-0026.

Notice of Appeal Filed: May 30, 1998, and April 7, 1998,No. 99-509.

Denied: June 22, 1999.

Petition for Rehearing Denied:October 15, 1999.

Before: BOGGS, NORRIS, and BATCHELDER

Amended:99-509 No. 99-512 Pending.

Amended:99-909 No. 99-513 Pending.

No. 99-0509

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EARLENE POLYAK

Plaintiff-Petitioner

FILED OCT 15 1999

v

CHARLES W. BURSON et al.,

BEFORE: BOGGS, NORRIS, and BATCHELDER, Circuit Judges.

Earlene Polyak has filed a petition for re hearing her application for leave to file pursuant to this Court's order in Buford Evans & Sons v Polyak No. 92-5240 WL 1992 at *(6th Cir Oct 20, 1992(order).

Upon careful consideration this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order.

The petition for rehearing is thus denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

No. 99-0509

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EARLENE POLYAK FILED JUN 22 1999

Petitioner-Plaintiff

v

CHARLES W. BURSON et al.,

Before BOGGS, NORRIS and BATCHELDER, Circuit Judges.

Earlene Polyak applies for leave to file pursuant to this court order entered in Bufore Evans & Sons v Polyak No. 92-5240, 1992 WL 301959 at *2(6th Cir Oct. 20, 1992)(order)

Upon review, the application is hereby denied.

ENTERED BY ORDER OF THE COURT

S/ Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
U.S. Post Office Courthouse Building
Cincinnati, Ohio 452-3988

December 9, 1999

Earlene Polyak
145 Lakeside Drive
Jupiter, Florida 33458

Re: 99-509 In re: Earlene Polyak

Dear Mrs. Polyak,

Neither the federal rules of appe- llate procedure not the local rules permit successive petitions for rehearing to be filed. National Latex Co. v. Sun Rubber Co. 276 F 2d 167 F.2d 167 6th Cir. 1960,Billy Frank Richard Sr. v United States, No.95-3877,6th Cir,Aug .22 1966. Having petitioned for rehearing by the original panel decision in this case,the ruleing on October 15th which denied the petition terminated case. T successive petition for reconsideration will be kept only as correspondence in this case.

The other two orders are still pending when a final decision is rendered,you will have the opportunity to request the court to reconsider its decision if you disagree with the outcome.

Sincerely yours,
s/Janice E. Yates
Chief Deputy Clerk

No. 92-5240

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BUFORD EVANS & SONS

Plaintiff-Appellee FILED JAN 11 1993

v

EARLENE POLYAK

ORDER

BEFORE KEITH NELSON AND RYAN, Circuit Judges

This case is before the court on Mrs Earlene Polyak's response to show cause order issued by the Court. To show cause order requested Mrs. Polyak to indicate why injunction should not be entered against her to prevent her from filing continued frivolous litigation We have examined Mrs Polyak's response and it contains no arguments that would prevent the issuing of injunction. Mrs Polyak's repitious litigation makes the entry of such injunction appropriate. See Lysiak v Comumn, 816 F 2d 311 312-13(7th Cir 1987).

Upon consideration of the court, it is hereby ordered that Mrs Polyak be enjoined from filing, instituting, continuing or prosecuting

any civil action in this or any other federal court in this circuit without first obtaining leave of the Court.

In seeking leave to file, Mrs Polyak shall certify that her claim or claims she present are new claim never before raised and and disposed on the merits by any federal court.

Such claims may not be related to or arise from the following:litigation originating from the partition sale of land in Tennessee inherited by Mrs Polyak and her siglings as tenants in common,objections to fees or sanctions for which ordinary review has been exhausted, or officer or employees actions taken in the course of their official duties exercised in connection with Mrs Polyaks previous litigation. She shall certify that her action is taken in good faith and the claims she raises are not frivolous or malicious.

A motion for leave to appeal must be captioned Application Pursuant to Court Order

Seeking Leave to File, and Mrs Polyak must affix a copy of this order to that motion. Failure to comply with the terms of this injunction will be grounds for denying leave to file. Claims considered malicious, frivolous or brought in bad faith may be grounds for civil contempt proceedings.

The following procedured shall govern appeals in this court filed by Earlene Polyak until such time as the court othersise orders

Upon timely receipt of a complete petition for leave to appeal, the court shall direct the Clerk of the appropriate lower court to transmit the full record of the case.No further proceedings shall take place nor shall any further fillings be accepted, until court has reviewed the petition to determine whether Polyak's appeal presents a colorable claim.This injunction applies to all appeals and other actions after the date this order filed.

ENTERED BY ORDER OF THE COURT
S/Leonard Green Clerk

No. 9 -0508
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Earlene Polyak

FILED MAR 12 1998

Petitioner

ORDER

Before: KRUPNANSKY, NELSON and BATCHELDER
Circuit Judges

The Petitioner has submitted to the Court for an injunction enjoining the sale of real estate, pursuant order of the Chancery Court of lawrence county, Tennessee, scheduled for March 14, 1998. She asserts such an injunction is needed because the state courts denied a jury trial in the underlying estate proceeding for partition of property.

In order on January 11, 1993 this Court enjoined the petitioner from filing further appeal in this court unless she first filed application for leave to appeal and certified that the claim to be raised were never disposed of on merits by any federal court.The order expressley prohibited the petitioner from presenting,inter alia, any claims

related to or arising from the partition sale of land in Tennessee inherited by Mrs Polyak and her siblings as temants in common....The Petitioner filed such application for leave to appeal in this case and, in order on March 10, 1998 we denied such application on grounds it did not complay with January 11, 1993 injunction. There is nothing presented in the present application for injunctive relief which would warrent reconsideration of that order or different result.

It is therefore ordered that the application for injunction is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

January 6, 2000

Ms. Earlene Polyak
145 Lakeside Drive
Jupiter, Florida 33458

Re: Earlene Polyak
v. Paul Summers,Attorney
General of Tennessee et al.,
Application No.99A554

Dear Ms. Polyak:

The application for extension of time whithin which to file writ of certiorari in the above entitled case has been presented to Justice Stevens, who on January 6, 2000 extended the time to and including March 13, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTTER
CLERK
S/Jerry Atkins
Ass. Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON DC 20543

William K. Suter
Clerk of the Court

MARCH 11, 1998

Re: Earlene Polyak v Frank Hulen
Estate, Dora lee Hulen and
Wilma Lesnansky

Dear Mrs. Polyak:

Your application for injunction received March 6, 1998 is herewith returned for the following reasons:

For reasons stated in my letter dated March 3, 1998. In addition I have checked with the Sixth Circuit and they do not have a request for an injunction pending,there is no record that you have requested this relief from the lower courts. Your check in the amount of $300 dollars is again returned.

Sincerely,
William K. Suter
s/Cynthia Rapp

APPENDIX B

In the United States district Court, Middle District of Tennessee No. 1:98-0026.

Earlene Polyak v The Honorable Charles Burson; Frank Hulen Estate; Dora Lee Hulen and Wilma Lesnansky No.1:98-0026.

Filed: February 12, 1998.

Amended with removal of Chancery No.7951-96;Dismissal of Counter Claim; Judgment on the Pleadings; Order of Sale and CC: 452-98(Probate No. 10649) and Parties: The Honorable Jim Hamilton,Circuit and Chancery Judge; Jerald Wilson, Circuit Court Clerk; Dalton Mounger; and Geneva Frisbee Clerk & Master on February 12, 1998.

Dismissed: Complaint and Jury Trial Demand 1: 98-0026 March 4, 1999 on Magistrate Judge William A. Hayes Jr. December 15, 1998.

Second order Dismissal: June 9, 1999,

Judge Altea A. Trauger.

Denied: Objection to Magistrate Judge

28 U.S.C. 636(c)(1) on July 8, 1998.
Appealed two(2) times $210.00 dollars

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

EARLENE POLYAK

FILED JULY 8 1998

V

No. 1:98-0026
JUDGE CAMPBELL

THE HONORABLE CHARLES
BURONE et al.,

ORDER

Pending before the Court is Plaintiff's Objection to Magistrate and Motion to set aside order(Dkt. No. 39). Plaintiff objects to this Court's order of May 20, 1998, in which it referred this case to the Magistrate Judge for entry of a scheduling order, for decision on all pretrial, nondispositive motions, and for reports and recommendations on al dispositive motions. See Docket No. 37.

Plaintiff misunderstands the Court's order. Plaintiff is correct the have a case tried by the Magistrate Judge is entirely voluntary.Plaintiff is correct that she is entitled to have case tried by Court and/or a jury.

The order referring this case to the

Magistrate Judge for nondispositive,pretrial does not disturb or violate Plaintiff's constitutional rights. The merit of Plaintiff's case will be tried and decided by this Court. The Magistrate Judge will merely make preliminary, pretrial, nondispositive decisions and enter a scheduling order for the expident conduct of this case.

Federal law provides that the Court may designate a Magistrate Judge to hear and determine any nondispositive pretrial matter pending before the Court.28 U.S.C. 626(b)(1)(A). This Court may reconsider any such ruling if they can show that it is clearly erroneous to law Id. In addition, this Court will decide all non dispositive matters, such as motions to dismiss or summary judgments,and this Court will conduct the trial.Plaintiff's objections are overuled.

s/Todd Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EARLENE POLYAK

Plaintiff

v

CHARLES BURSON et al.,

Defendants

FILED JUN 9 99

Civil Action 1:98-0026

Judge Trauger

ORDER

On April 23, 1999 Magistrate Judge Haynes issued a Report and Recommendation,recommending that counsel for the defendants Frank Hulen ,Estate,Dora Lee Hulen and Wilma Lesnansky be awarded $ 1,687.50 in attorney fees.On April 30, 1999, plaintiff filled a document entitled Second objection and Demand Oral Argument to Dalton Mounger's Misrepresentation of Charges and Motion to Set Aside Rule 60 b FRcivP.

To the extent that this filing constitute objections to the Report and Recommendation, the Court overules those objections. The report and Recommendations is hereby made the order of this Court for reasons stated therein.

It is so ordered.

Enter this 8th day of June 1999

s/Aleta A Trauger
U.S. District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EARLENE POLYAK

Plaintiff

v

THE HONORABLE CHARLES BURSON et al.,

FILED MAR 4 1999

No. 1:98-0026
Judge Altea A. Trauger

ORDER

Presently pending before the Court is the Magistrate Judge's Report and Recommendation (R&R) entered December 15, 1998(Dkt. No.51), to which the Plaintiff has filed an objection (Dkt. No. 55) and supplemental objection(Dkt. No. 60).

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and Local Rule 302, this court is required to review the Magistrat Judge's recommendations de nova Rule 72(b) specifically states:"the judge may accept,reject or modify the recommended decision, receive further evidence, or recommit the matter to magistrate judge with instructions (FED.R. CIV P 72(b).

After fully reviewing the record in this case, including the Magistrate Judge's Report and Recommendation and Objections thereto,the Court is of the opinion that the Magistrate Judge's findings and conclusions are correct and hereby adopted and approved. The court agrees that the plaintiff's lawsuit is barred by the doctrine of res judicata because the allegations and claims arise from the same cause of action and allegations as in Hulen v Earlene Polyak No. 1:96-0112 M.D.Tenn(Higgins J.) and Polyak v Hulen 1:84-0083 M.D. Tenn. (Wiseman J.) which were both barred under the res judicat a doctrine.

Accordingly, defendants' motion to dismiss (Dkt. No.16, 22,26,and 29) are hereby granted, and defendants Hulen Estate ,Hulen, Lesnansky, and Mounger's motion for sanctions (Dkt. No. 41) is granted so as to award attorney fees. Defendants' motions to strike Plaintiff's motion for extension of time(Dkt No. 54,56) are denied as moot. Counsel for defendants shall file fee affidavits within

20 days if the entry of this order, and the court refers awarding of fees to Magistrate Judge Hays.

The court further orders that plaintiff shall be required to obtain leave of the court to file any future action in light of her repeated filings despite prior court sanctions The Clerk is hereby directed to not accept further filings by the plaintiff without prior order of the Court. After the awarding of fees, this case will be dismissed with prejudice pursuant to FED. R. CIV.P. 41(a)(2).

It is so ordered.

Entered this 4th day of March,1999.

s/Altea A Trauger
United States District
Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EARLENE POLYAK

Plaintiff FILED DEC 15 1998

v

THE HONORABLE CHARLES
BURSON et al.,

REPORT AND RECOMMENDATION

1. INTRODUCTION

This civil action was referred to the Magistrate Judge by the Honorable Todd J. Campbell, District Judge, by order entered May 20, 1998(Dkt. No. 37). The Magistrate Judge was directed to enter a scheduling order, decide all pretrial, non dispositive motions,and provide reports and recommendations on all dis positive reports and recommendations on all dispositive motions.

Plaintiff Earlene Polyak filed this action under 28 U.S.C. 1332, the federal diversity statute, originally against defendants: Honorable Charles Burson,former Attorney General of Tennessee(Fed R. Civ.P 25 (d),the current Attorney General John Knox

Walkup, Frank Hulen Estate,Dora lee Hulen and Wilma Lesnansky concerning the family farm inherited by Earlene Polyak, Frank Hulen and Wilma Lesnansky from their Mother Rena in 1976. In Polyak's amended complaint(Dkt. No2 she adds as parties Jerald Wilson, Circuit Court Clerk, Dalton A. Mounger, and Geneva Frisbee, Clerk and Master. Polyak served process on Judge Jim hamilton and the Governor of Tennessee althouth they are not named as parties in the captions or body of the original complaint or amended asction.

Pending before the court re several motions. The first motion to dismiss filed by defendants Frank Hulen Estate, Dora Lee Hulen, Wilma Lesnansky, and Dalton Mounger(Dkt. No. 22). seeking dismissal of Polyak's amended complaint contending the doctrine of res judicata bars Polyak's relitigation of the allegations in her complaints.Second, The defendants Wilson and Frisbee move to dismiss for the same reason(res judicata) as well as alternatively moving for a more definite

statement of facts as to their alleged acts or ommissions (Dkt. No. 26). Third, the defendants Walkup, the Governor of Tennessee, and Judge Jim hamilton move to dismiss the action against them for failure to state a claim(Dkt. No.16 and 29). Fourth, the defendants Hulen estate, Hulen, Lesnansky and Mounger move for sanctions against plaintiff for this frivolous filing in violation of Fed.R.P.11(Dkt. No. 41).

In response, Polyak reiterates that the defendants violated her federal rights to due process, a jury trial and equal treatment(Dkt. No. 27 and 32).

For the reasons set forth below,Magistrate Judge concludes that this action is barred by the res judicata doctrine in light of the plaintiff's numerous attempts to litigate the core claims in this action, in this and other courts.Thus, the pending motions to dismiss should be granted as well as the motions for sanctions.

II. ANALYSIS OF THE COMPLAINTS AND MOTIONS

According to her original complaint, this

action arises from state court proceedings relating to property in the estate of Rena Hulen to which the plaintiff claims interest. (Dkt. No.1 Original Complaint at 13). There is a reference to a removal of that state action, however but there is no formal papers.

In her originsl complaint, Polyak alleges that she never agreed to the sale of the partition of property to Rena Hulen Estate Id at 28. Polyak claims that none of the defendants contributed any labor or money for the removal and restoration of the roof on Rena Hulen's house, which plaintiff expended for a retirement home. Id at 15. Polyak alleges that she has been denied power as administratrix and that the defendants Frank Hulen and Wilma Lesnansky failed to contribute to restoration and maintenance of Rean Hulen Estate Id at 71. Polyak further alleges that she suffers from stress and anxiety from her numerous court appearances and personal involvement in her suits, embarassement in defending her constitutional rights, the loss of interest and

investment, and loss of every day pleasures o life Id.

Plyak filed a Complaint and Demand Jury Trial against Wilma Lesnansky and Frank Hulen on December 28, 1995 that was dismissed by th Chancery Court of lawrence County,Tennessee on February 16, 1996 (Dkt. No. 28 Motion to Dismiss at Ex. A thereto). The state court dismissed the action because Polyak had already litigated the dispute about a partition order with the defendants in several courts and that the avernments were substantially the same as the ones in the Chancery Court Id at Ex.B. The Chancery Court concluded that Polyak's actions appeared from the record as frivolous and vexatious.Id. Polyak attempted to appeal the order of the Chancery Court,but she refused to file and appeal bond,and her right to appeal expired Id at 4.

Frank Hulen died on April 11, 1996, and Dora Lee hulen is the executrix of his estate and sole beneficiary under his will Id at Ex. D).Dora Lee Hulen and Wilma Lesnansky subs-

sequently filed a complaint for partition in Chancery Court of Lawrence County, Tennessee May 10, 1996 to obtain accesable and understandable order for partition of the family farm Id. On June 7, 1996, Polyak filed an Answer to complaint, counter-claim and Jury Trial Demand in Chancery Court and in this Court Id at Ex.E.

The Court construed the pleadings as a Notice of Removal 28 U.S.C. 1441 and filed pleadings as Case No. 1:96-0112. Polyak's Claim in her answer,complaint and counterclaim and her calim for a jury trial demand ultimately dismissed by the Honorable Judge Thomas Higgins by order entered on November 5, 1996 Hulen v Polyak No. 1:96-0112,Dkt No. 14 Order. Judge Higgins found that the action was barred by the doctrine of res judicata Polyak appealed Judge Higgins order to the United States Court of Appeals for Sixth Circuit, but her appeal was denied (Mar 10,1998).

During the pendency of the federal proceeding on June 19, 1996,Dora Lee hulen and

Wilma Lesnansky filed a Motion to Dismiss the Counter-claim and a Motion for Judgment on the Pleadings in the action for partition on January 30, 1998, motions were set for hearing for February Id at Ex.F. A copy of notice of hearing was sent to the address that Polyak used in filing that she made with the United States Court of appeals for the Eleventh Circuit on December 18, 1987 and a filing in the Court of Appeals ,Middle Tennessee on January 16, 1998. On February 10, 1998, the Chancery Court for Lawrence County Tennessee dismissed Polyak's counterclaim, granted Judgment on the pleadings, and ordered the family farm sold in a partion sale Id at Col.Ex. L (Dalton Mounger

Defendants note that Polyak has had litigation pending in six different courts on the same claims that have already been decided in several courts including,the United States Court of Appeals Sixth Circuit. The defendants further contend that the doctrine of former suit pending applies because there are several lawsuits concerning the same issues pending,

which prevents this Court having jurisdiction of this case Id at 18. Also, the defendants contend that Polyak fails to state any comprehensible claim upon which relief can be granted Id at 19.

For the other defendants, Jerald Wilson and Geneva Frisbee rely upon the motion to dismiss and exhaibits attached thereto filed by the defendants,Frank Hulen Estate,Dora Lee Hulen, Wilma Lesnansky, and Dalton Mounger.See Dkt Entry 22. Defendant Walkup,Attorney General of Tennessee, notes that only mention of him in paragraph 59 of the original complaint(Dkt. No. 1) where Polyak states that she mailed a copy of a document dated January 27, 1998 to former Attorney General Charles Burson.(Dkt. No. No. 17 at pp 1-2). Defendant Walkup, assert there is no other mention of the Attorney General in the original complaint or amended complaint Id at 2. Similar, the Governor of Tennessee and Judge Jim Hamilton are not named in either the complaint nor amended complaint Judge Hamilton asserts judicial immunity

doctrine as well as doctrine of res judicata Id at pp.1-6. Polyak previously sued Judge Hamilton about partition of this property, and upon appeal to the Sixth Circuit, the Court entered and Order dismissing the action entered on November 29, 1989, refusing to re-open litigation against Judge Hamilton Id at pp. 4-5 Attached thereto order.

The Magistrate Judge finds that the allegations amd claim in this action are derived from the claims and allegations in Hulen v Polyak No. 1:96-0112. In that case, the Honorable Thomas Higgins referred plaintiff motion to dismiss to the Magistrate Judge to prepare proposed findings of fact and recommendations for disposition Id. at Dkt. No. 5. The Magistrate Judge found the following facts:

> Plaintiff's Dora Lee Hulen("Hulen") and Wilma Lesnansky("lesnansky") prignally filed this declaratory judgment action in the Chancery Court of lawrence County against Defendant Earlene Polyak ("Polyak") a resident and citizen of Trenton, Michigan(Dkt. No. 1 Attached thereto). Plaintiffs seek a declaration on their rights to have a

petition of real property consisting of 42.5 acres and a house and barn, in Lawrence County, Tennessee Id. This property was a part of the estate of Frank Hulen, the parties' father The plaintiffs seek a declaration of their right to petition and sell this property proceeds therefrom to be districbuted among the plaintiffs and defendants equally.

In response to the plaintiff's complaint, Polyak filed an answer and counterclaim in this court, attaching thereto a copy of the plaintiffs' complaint in state court action. This court treated the defendants' complaint as removal petition under 28 U.S.C. 1441

In answer part of her pleading,Polyak alleges deprivation of her rights under Fifth, Seventh and Fourteenth Amendments (Dkt. No.1 at p. 2) and asserts claims under 42 U.S.C. 1981, 1982, and 1983,Ld. Polyak also cites 28 U.S.C. 2043, but that statute relates to the handling of funds by a District Court Clerk. In addi tion to federal claims , Polyak asserts state common law calims for fraud and mis-representation by plaintiffs'counsel who is not a party. For relief, Polyak seeks damages and injunctive relief.

As to factual allegations, Polyak alleges that on December 28, 1995 she filed a complaint that was dismissed and the Clerk & Master of the court allegedly denied Polyak an appeal.Ld at p. 3. Accord ingly to Polyak's answer, however there were two unsuccesful appeals,one which involves an unappealable order Id.Accord-ingly to the allegations in her answer, partition saled of the property were attempted in 1981 or 1983,and between November 1987, September 21,1988 Id.

In the section of Polyak's pleading in this action containing her counterclaim, these claims are for the denial of constitutional right and interest under Tennessee statute 27-29-117 Partition in Kind Counter -Plaintiff contends that any order divesting her constitutional right and interest in whole and equal right to enjoy ment of Rena Hulen Estate be set aside pur suant to Fed.R. Civ.P 60(b). (Dkt. No. 1 Attachment thereto, Answer Counter-claim and Jury Trial Demand at p. 3). In addition Polyak,alleges a denial to right of jury trial by the state court and an earlier court proceeding by the state Court Clerk. Id at 4.For her denial of a jury claim the State court allegedly ruled against Polyak, while Polyak allegedly had another action pending before a jury or that was tried by a juryId. The dates of these state court proceeding is alleged to be 1974 or 1981. Id at 4. Polyak denial of an appeal charge refers to a dis missal of her appeal in state courts with out prejudice because the state court order Polyak challenges the transfer of federal tobacco allotment from this property with out notice to her Id.

In their pending motion to dismiss, the plaintiffs argue that Polyak's counter claim in this action is barred by the doctrine of res judicata in light of the prior adjudications of Polyak's right to legal interests in this property by the United States court of Appeals for the Sixth Circuit and the State Court.Plaintiff argues that the state courts have determ-ined Polyak's rights at issue here, but Polyak repeatedly litigated these claims despite prior court rulings against her. Due to the confusion caused by Polyak's vexatious conduct in the Courts,plaintiff filed this declaratory judgment action to clarify the state court record.

In prior federal action cited by the plaintiffs, the Sixth Circuit entertained nine actions filed by Polyak in this District, contesting the partition sale of property inherited from the parties parents(Dkt. No.3 Ex. D thereto).The Sixth Circuit noted that failing to prevail in state court litigation, Mrs Polyak began her assault on the petition sale in federal court in 1985. Id at p.2. The parties in the Sixth Circuit action included plaintiff Lesnansky here and Polyak's brother Frank Hulen. The Court of Appeals concluded:

> Additionally, a review of the long history of Mrs Polyak's litigation reveals that she is, once again, seeking to rel-litigate the partition sale of the familys farm. Although she is claiming the unconstutional deprivation of a property her claim is nothing more than a recycled argument that could have been raised in 1976 during the property's partition. The same deprivation of a tobacco allotment argumenthas been argued on appeal at least four times and sanctions against Ms Polyak were imposed in Case No.89-5496 and Case Nos 56 55/5656/5657, which asserted that her numerous cases be reopened on the base of new evidence.

Id at p.3. The Report and Recommendation concluded that under Tennessee and federal law that action was barred under res judicata doctrine.Accord Polyak v Hulen 1:84-0083 M.D.Tenn. Order filed December 3, 1984(Wiseman DJ).

III. CONCLUSIONS OF LAW

For the applicable principles of law,the

Magistrate Judge adopts his discussion in Hulen.

> In actions under federal law, the judicial doctrines of res judicata and collateral estoppel have long been invoked bar an action that is based upon legal claims and/or facts asserted in prior action. The res judicata doctrine bars parties from relitigating issues that were or could have been raised in that action Allen v McCurry449 U.S. 90 94 101 S Ct 411, 66 L Ed 308(1980). Under the collateral estoppel doctrine, once a court has decided an issue or fact of law necessary to its judgment, that decision may preclude relitigation of the issue on a different cause of action involving a party to the first caseId at 94(citing Montana v United States, 440 U.S. 147 153 99 S.Ct 970, 59 LEd 2d 210(1979).Federal Law on res judicata and collateral Estopel obtains if the prior action involves a federal claim See Allen449 U.S. at 94-95.
>
> In City of Canton Ohio v Maynard, 766 F 2d 236, 238(6th Cir. 19850,the Court of Appeals explained that generally there were two branches of res judicata doctrine. As a general proposition of law there were two branches of res judicata claim preclusion and issue preclusion. Under claim preclusion brahch,an earlier final judgment on the merits precludes a party from raising an issue in new litigation that should have been advanced in the earlier proceedings.Under issue preclusion branch,parties are precluded from relitigating an issue of law or fact which was necessarily decided in a previous final judgment(emphasis added and citations omitted). Accord Childs v Trippett, 56 P.3d 64, 1995 WL299042(6th

Cir 1955).(unpublished) (Childs had previously filed suit against Wallace,Finley and Roach in 1992 raising the same issues presented in this case. Therefore,Childs claims as to these defendants are barred by the doctrine of claim preclusion.

The absence of identical parties does not avoid the preclusion effects of the res judicata doctrine. Smith's issues relating to his parole revocation were properly dismissed under the doctrine of res judicata.Smith had a fair opportunity to fully litigate his parole revocation claims in a mandamus/habeas corpus action frought befor the Ohio Court of Appeals,Tenth Appellate Court District...Smith argues that claim preclusiondoes not apply in this case because the defendants in the state action differed from the defendants in the instant case. However, both Capots (as director) and Flannery(as parole officer) are privies of the OAPOA and thus satisfy the requirements of res judicata.

Smith v Capots, 78 F3d 585 1996 WL9932 (6th Cir. 1996).

All of these calims appeal to have been asserted in Polyak's 1985 federal action subsquent appeal, or could have been asserted in the several actions culminated in her Sixth Circuit appeal quotated above. Polyak's claim in her counterclaim in this action include events allegedly occuring in 1981, 1983 and 1987 court proceedings. The alleged partition and alleged denial of federal tobacco allotment claim were clearly presented and determined in that appeal.From the pendeny of this action in state courts, there remains the prospect of appeals.

For these reasons, the Magistrate

Judge recommends that the plaintiff's asserted federal claims be dismissed with prejudice and that plaintiffs' motion to this action to the state court be granted.

Hulen et al., v Polyak No. 1:96-0112 Docket Entry No. 10, Report and Recommendation and dis missed that action withprejudice Id at Docket Entry No. 14, Order entered November 4, 1996.

The Magistrate Judge concludes that this action is yet another attempt by Earlene Polyak to relitigate the same issues. The Magistrate Judge concludes that Polyak's claims in this action are barred by the doctrine of res judicata and should be dismissed. The Magistrat Judge concludes,as did Judge Wiseman that Polyak's repeated filings of these claims violates Fed R. 11 and warrents an award of attorney fees.Polyak v Hulen et al, 1:84-0083 M.D. Tenn Meorandum at pp. 1-2 (Wiseman DJ). This award shall be in accordance with local Rule 13, if this recommendation is adopted.The magistrate Judge also concludes that any costs incurred in this action should be imposed upon the plaintiff. Sales v Marshall,873 F 2d 115,

120(6th Cir 1989), and that Polyak be required to obtain leave of Court to file any future actions. Filipas v Lemons, 835 F 2d 1145,1146 (6th Cir.1987). In light of Polyak's repeated filings despite prior court sanctions,this form of injunctive relief is necessary.

IV RECOMMENDATIONS

For the reasons stated above, Magistrate Judge recommends that the defendants' motions to dismiss(Dkt. Nos. 16, 22, 26, and 29) be granted and that the defendants, Hulen Estate, Hulen, Lesnansky, and Mounger's motion for sanctions(Dkt.No. 41) be granted so as to award them their attorney's fees in accordance with Local Rule 13. The Magistrate Judge further recommends that costs be assessed against the plaintiff and that the Clerk be directed not to accept for filing any papers presented to the Clerk without prior Order of the Court. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from the receipt of this Report and Recommendatio n with the District Court. Any party opposing said

objections shall have ten (10) days from receipt of any objections filed to this report in which to file any response to said objections. Failure to file objections within ten (10) days of receipt of this Report and Recommendation can constitutea waiver of further appeal of this Recommendation Thomas v Arm , 474 U.S. 140, 106 S.Ct 466, 88 L.Ed. 435 (1985). Reh'g denied , 474 U.S. 1111(1986).

Entered this the 11th day of December, 1998.

s/ William J. Hayes Jr.
United States Magistrate
Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

EARLENE POLYAK

Plaintiff

v

HONORABLE CHARLES BURSON et al.,

FILLED MAR 13 1998

No. 1:98-0026
Judge Campbell

ORDER

On March 14, 1998, a court ordered auction will be held in Lawrence County to dispose of the estate of Rena Hulen, the plaintiff's deceased mother. The plaintiff has filed an application March 6, 1998(Dkt.5) for an injunction to stay auction.

In exercising its discretion to grant a temporay injunction a district court must weigh (1) whether the plaintiff has shown a strong or substantial liklehood of success on merits(2) whether thr plaintiff has shown irreparable injury,(3) whether the issuance of a preliminary injunction would cause harm to others, and (4) whether the public interest would be served by the issuamce of a preliminary injunction.Friendship Materials

Inc., vMichigan Brick Co., ¢&(F2d 100 102 (6ht Cir 1982).

The plaintiff has made no strong or substantial showing that she will prevail on the merits. Nor has she demonstrated that injunction needed to prevent irreparable harm. The auction may result in a financial loss to the plaintiff. This loss may later be recovered as damage should she be successful on merits.

In any event,a preliminary injunction can not issue without notice to all adverse parties Rule 65(a)(1), Fed. R. Civ. P. The Certificate of service accompanying the plaintiff's application indicates that only two defendants were served with a copy of this pleading.The Plaintiff's application for a stay of auction lackes merit and is hereby denied.

It is so ordered.

s/Todd Campbell
United States District
Juege.

APPENDIX C

In the Chancery and Circuit Court of Lawrence County, Tennessee.

Dora Lee Hulen and Wilma Lesnansky v Earlene Polyak Chancery No. 7951-96,Dismissal of Counterclaim No.7951-96, Judgment on the Pleadings 7951-96,and Circuit Court No.CC:452-98(Probate(10496).

Earlene Polyak v Frank Hulen and Wilma Lesnansky No. 7736-95.

Issued:Order for Sale issued Feb. 10,1998.

Judge:The Honorable Jim Hamilton.

In the Court of Appeals of Tennessee No. 01A01-98-CH-00133(Consolidated 7951-96 and 7736-95.(Case No. M1998-00146-SC-R11-CV).

Reversed and Remanded:April 30, 1999.

Before: Hon. Ben H. Cantrell, Presiding Judge and William C.Kotch and Patricia J. Cotterll Judges.

Denied: Tennessee Supreme Court appeal September 13, 1999, and petition for rehearing on November 29, 1999.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EARLENE POLYAK

v

DORA LEE HULEN
AND WILMA LESNANSKY

FILED NOV 29 1999

No. M1998-00146-SC-R11-CV
Lawrence County
Appeal No.
01A-01-9803-CH-00133

Lawrence Chancery No.
7951-96 and 7736-95

ORDER

The plaintiff, Earlene Polyak has filed a petition to rehear her application for permission to appeal,which this court denied on September 13, 1999. Upon reconsideration of the application for permission to appeal and the entire record in this cause, the Court concludes that the petition to rehear should be, and is hereby denied.

PER CURIAM

SUPREME COURT OF THE STATE OF TENNESSEE

EARLENE POLYAK
Plaintiff/Appellant FILED FEB 3 1999

v

Appeal No.
010A-9803-CH-00133

EASTATE OF FRANK HULEN,DORA
LEE HULEN AND WILMA LESNANSKY
Defendant/Appellees

ORDER

Plaintiff/Appellant Earlene Polyak filed a petition for rehearing petition for extra-ordinary writ to correct record in court of appeals and stay to set aside third sale for constitutional right to jury trial and change venue.After due consideration it is the opinion of this Court that the petition should be denied.

Therefore, it is hereby ordered that the petition for extraordinary writ to correct record in court of appeals and stay to set aside third sale for constitutional right of a jury trial and change venue is denied.

For the Court:
s/Justice Frank F. Drowota

COURT OF APPEALS 615/741/2681
401 7th AVENUE NORTH,ROOM 100
SUPREME COURT BUILDING
NASHVILLE, TENNESSEE 37219-1407

POLYAK, EARLENE
145 lakeside Drive
Jupiter, florida 33458

EARLENE POLYAK V DORA LEE HULEN & WILMA LESNANSKY CASE NO. 01A01-9803-CH- 00133

NOTICE

PLEASE TAKE NOTICE OF THE FOLLOWING ACTION

FILE DATE 10/5/99
PETITION FOR WRIT OF MANDAMUS FOR RECUSAL FILED ON BEHALF OF PETITIONER, EARLENE POLYAK

CECIL CROWSON JR CLERK
COURT OF APPEALS 615/741/2681

cc:

POLYAK, EARLENE DALTON M.MOUNGER

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TENNESSEE, AT LAWRENCEBURG

DORA LEE HULEN AND
WILMA LESNANSKY

Plaintiffs

v

EARLENE POLYAK

Defendant

FILED FEB 10 1998

No. 9751-96

ORDER DISMISSING COUNTERCLAIM

This cause came on for hearing upon the motion to dismiss the Defendant's counter-Claim for failure to state a claim upon which relief can be granted, and the Court finds that said counterclaim should be dismissed for failure to state a claim upon which relief can be granted

It is therefore ordered that the Defendant's counterclaim is dismissed with prejudice.

Dated this 10th day of February, 1998

s/Jim T. Hamilton

APPROVED FOR ENTRY:
s/Dalton M. Mounger
Attorney for Plaintiff

I Dalton Mounger certify that on the 10th day of February,1998, a copy of the foregoing was mailed to Earlene Polyak, 3179 Middlefield Drive, Trenton, Michigan.

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TENNESSEE, AT LAWRENCEBURG

DORA LEE HULEN AND
WILMA LESNANSKY FILED FEB 10 1998

Plaintiff

v No.7951-96

EARLENE POLYAK

Defendant

JUDGMENT ON THE PLEADINGS

This cause came on for hearing upon the motion of plaintiffs,and the Court finds that the Defendant has asserted no viable defense to the complaint. Therefore, judgment is rendered in favor of the plaintiffs,and the Clerk and Master is appointed Special Commissioner to sell the property described in the complaint

Dated the 10th day of Feb. 1998

s/Jim T. Hamilton

APPROVED FOR ENTRY:
s/Dalton M. Mounger
Attorney for Plaintiffs

I Dalton Mounger certify that on the 10th day of February, 1998 mailed a copy of foregoing to Earlene Polyak 3179 Middlefield Drive Trenton, Michigan 48183

s/Dalton Mounger

IN THE CHANCERY COURT OF LAWRENCE COUNTY,
TENNESSEE AT LAWRENCEBURG

DORA LEE HULEN AND
WILMA LESNANSKY

FILED FEB 11 1998

Plaintiffs

No. 7951-9¢

v

EARLENE POLYAK

Defendant

ORDER FOR SALE

The Clerk and master is ordered to sell the land described in the complaint at public auction prusuant to the provision of Tennessee Code Annonated 35-5-101 et seq., the Clerk and master is specifically authorized secure the services of an auctioneer licesn ed in this state to conduct such public sale; and the expenses of the sale and the auctioneer shall be paid from the proceeds of the sale.

Dated this 11th day of February, 1998.

s/Jim T. hamilton

APPROVED FOR ENTRY:
s/Dalton M. Mounger
Attorney for Plaintiffs

I Dalton Mounger certify that on the 11th of February ,1998 mailed a copy of foregoing to Earlene Polyak 3179 Middlefield Dr. TRenton, Michigan 48183.

s/Dalton M. Mounger

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TN

DORA LEE HULEN AND
WILMA LESNANSKY

FILED FEB 10 1998

Petitioners

v

Civil Action 7951-96

EARLENE POLYAK

_____/

ORDER

Upon motion of the Clerk and Master, as Special Commissioner to set the terms of sale of property in this cause, it appears to the Court that the auction sale be conducted on the premises and that the sale be a final sale and that the bids not be held open for ten(10) days.

It is therefore ordered, adjudicated and decreed that the highest bid received for the property being sold in this cause will be final bid and that the bid not be held open for ten (10) days.

Said final bid will be subject to confirmation of sale by the Chancery Court.

This the 10th day of February, 1998.

s/ Jim T. hamilton

IN THE CIRCUIT COURT OF LAWRENCE COUNTY, TENNESSEE AT LAWRENCEBURG

IN THE MATTER OF:

THE ESTATE OF FRANK HULEN DECEASED

FILED FEB 10 1998

CC:452-98

ORDER

This cause came on for hearing upon the claim against the Estate of Frank Hulen filed by Earlene Polyak: the exceptions by the Executrix the claim: the response to exceptions by Mrs Polyak; and Mrs Polyak's demand for a jury trial. Based upon the pleadings,the argument of counsel and the entire record as a whole, the Court finds as follows:

1. Mrs Polyak did not comply with the requirements of Tennessee Code Annonated 30-2-313(d) in her jury trial demand since it was not filed until more than five days after her receipt of the notice of filing of the Executrex's exceptions.

2. A significant portion of Mrs.Polyak's claim is barred by the doctrine of res judicata in that has already lititigated these issues with Frank Hulen as evidenced by the Court's

order in case No. 7736-95 in Chancery Court of Lawrence County, Tennessee.

It is therefore ordered adjudicated and decreed that Mrs Polyak's demand for a jury trial is dismissed and Mrs. Polyak's claim is dismissed.

Dated this 10th day of Feb., 1998

s/Jim T. Hamilton

APPROVED FOR ENTRY:
s/Dalton Mounger

In her amended complaint (Dkt.No 31), Polyak demands a return of $690.00 from Buford Evans, which she contends is owed by Frank Hulenand Lesnansky for illegal survey conducted fifteen years ago Id at 175. Polyak further complains to set aside any leins on her property for award of funds for attorneys Robert Boston and Boston Bates & Holt.Id at 177. Polyak also seeks to file a second amend ed complaint Dkt. No. 27,28,31,34. Polyak later asserts a counterclaim against Dalton Mounger for legal malpractice(Dkt. No. 36).

KENNETH WEATHERS
Lawrence County Clerk
Lawrence County Courthouse
204 West Gaines NBU
Lawrenceburg, Tennessee 38464

No. 10496
January 29, 1998

PLEASE TAKE NOTICE

IN RE: THE ESTATE OF FRANK HULEN

This 29th day of January, 1998 Kenneth Weathers,Clerk of the Probate Court of Lawrence County, certify that Claim,Exception to Claim and Response and Request for hearing in regards to the Frank Hulen Estate has been transferred to the Circuit Court of Lawrence County.

s/Kenneth Weathers
Probate Court Clerk

s/Gerald Wilson
Circuit Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

EARLENE POLYAK

FILED APR 30 1999

Plaintiff/Appellant

v

Appeal No.
01A01-9803-CH-00133

DORA LEE HULEN AND
WILMA Lesnansky

Lawrence Chancery
No. 7951-96 & 7736-95

Defendant/Appellees

JUDGMENT

This cause came on to be heard upon the record on appeal from the Chancery Court of lawrence county, briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that that in the judgment of the trial clurt there is reversible error.

In accordance with the opinion of the Court filed herin, it is, therefore, ordered and adjudicated by this Court the the judgment is reversed. The cause remanded to the Chancery Court of Lawrence county for further proceedings in accordance with the opinion filed herin and for the collection of costs accrued below.

Costs of this appeal are taxed against

We have also searched the records of this Court for evidence on which we could base a decision, but we have only found evidence that Ms. Polyak attempted to appeal a 1983 decision and that the appeal was dismissed for lack of a final judgment. Therefore, on the basis of what we have before us, we can not sustain a judgment on the pleadings or, a judgment of dismissal for failure to state a claim. On remand the appellees may be able to establish a record showing they are entitled to relief sought.

The judgments entered in the two cases from the lower court are reversed and the causes are remanded to the Chancery Court of lawrence County for further proceedings. Tax the cost of appeals to appellees.

s/Ben H. Cantrell
Presiding Judge

CONCUR:

s/William C. Koch Jr. Judge
s/Patricia J. Cotterell, Judge

OPINION

The family dispute over the partition of a forty-two acre farm in Lawrence County is well into its third decade. The Chancery Court of Lawrence County granted judgment on the pleadings and ordered the property sold for partition. We reverse and remand for further proceedings.

1.

Rena Hulen, the owner of the farm died in 1976.She left her property in equal shares to the three children, Earlene Polyak, Frank Hulen and Wilma Lesnansky.The farm contained a small house and a barn.

In 1983 Mr. Hulen and Mrs Lesnansky filed a complaint in the Chancery Court of Lawrence county asking that the farm be sold for partition. Ms. Polyak's defense has always been that the parties orally agreed to partition the property so that she would get the house and approximately ten acres on the front, Ms. Lesnansky would get a site for her son to build a house to the north of the farm

house, and Mr.Hulen would get some of the property on the back next to his own farm. Apparently Ms. Polyak lost the battle(the order from that case is not in the record), and she set out on a journey through the the federal courts, seeking to enjoin the sale of the property and to recover damages for a host of civil rights violations. The course of this journey is described in part in an order from the Sixth Circuit Court of Appeals filed on August 13, 1993:

> This case and eight others presently before the court(92-6345/6525; 6347/6528; 6526;6527;6529; and 6530C had their orgin in 1976 when Mrs Polyak and her two siblings inherited from their mother a family farm in Lawrence County,Tennessee, as tenants in common. Mrs Polyaks siblings sought and obtained a partition sale of the property. Mrs Polyak objected to the manner in which the farm was divided and began protracted state court proceedings.Failing to prevail in state court litigation, Mrs Polyak began her assult on the partition sale in federal court in 1985. She sought monetary damages and an order setting aside the partition sale. The defendants in this case are Mrs Polyak's brother Frank Hulen, and her sister Wilma Lesnansky. The defendants have long ago stopped filing briefs in response.
>
> Mrs. Polyak is appealing from order

entered by district court on October 6, 1992, in which the court held that it would not consider any further submissions by Mrs. Polyak to relitigate any issue regarding the parties or the property involved in the partition sale.

In December 1995, Ms. Polyak filed a complaint in the Chancery Court of Lawrence County against Ms. Lesnansky and Mr. Hulen. The basis of the complaint was the "settlement by agreement" of the parties in 1976. The Complaint went on to describe expenses Ms. Polyak had incurred while working on the house how her appeal of the order of sale was inadvertently lost, how tobacco allotment was transferred to another(unspecified) farm,and how the whole ordeal had caused her stress, anxiety, and embrassement. She prayed for $250,000 in compensatory damages and $250,000.00 in punitive damages, and a deed to the house and ten acres.

In February Mr. Hulen and Ms Lesnansky, acting pro se, moved to dismiss the complaint under Rule 12.06 Tenn. R. Civ.Proc., for failure to state a claim. The court entered an order on February 21, 1996,containing the

following findings:

It appears to the Court that the Plaintiff will pursue any means to relitigate the previous and related issues that were involved or which arose out of the same transactions and occurances that were involved in lawsuits already adjuciated in this Court, including in this instance, attempting to bring in as defendants the plaintiffs in the original lawsuit in which the plaintiff herein, Earlene Polyak was a defendant. That lawsuit was filed in the Chancery Court of Lawrence county, Tennessee, bearing action 1974. The Court takes judicial notice from the public record that plaintiff herein, Earlene Polyak, has already litigated this dispute with defendants named herein, in this and several other courts, and the avernments therein appear to be largely the same as in this particular case. The originsl case was appealed to the Tennessee Supreme Court. As mentioned, the dispute has also beenfiled by the plaintiff in numerous courts across the United States of America and has even been pursued to the United States supreme court.It appears from the record,the court's judicial notice of prior matters of public record,and defendant's motion that plaintiff's action is frivolous,filed in bad faith, vexatious and otherwise should be dismissed, fails to state a claim upon which relief can be granted and is barred.

The court therefore, on defendants' motion,and sua sponte, dismisses the lawsuit filed by the plaintiff,Earlene Polyak against the defendants, Frank Hulen and Wilma Lesnansky. Court costs are taxed to plaintiff.

In May 1966 Mrs Lesnansky and Dora Lee

Hulen filed a complaint in Chancery Court of Lawrence County seeking sale of the farm for partition. The complaint alleged that Frank Hulen died on April 11, 1998 and that Dora Lee Hulen was sole beneficiary under his will.

Ms. Polyak filed an answer and counterclaim containing the same allegations she pressed in the complaint just recently dismissed.She then filed a notice of removal in Columbia Division of the United States District Court. The district court remanded the state claims to the Chancery Court after dismissing the federal claims in the Counterclaim.

In the meantime, Ms. Hulen and Ms. Lesnansky had moved to dismiss the counterclaim for failing to state a claim on which relief can be granted. They also moved for judgment on the pleadings. On February 10, 1998 the Chancellor entered an order dismissing the counterclaim and another order ordering the Clerk and master to sell the property described in the complaint.

The two cases have been consolidated on appeal. Both cases were disposed of on motions to dismiss, either for failure to state a claim under Rule 12.02(6) Tenn R.Civ.P, or for a jdugment on the pleadings under Rule 12.03. Ourproblem stems from the fact that the chancellor sustained both motions on the grounds of res judicata, but the record on appeal does not contain the support for that ruling,in fact, the defense of res judicata has not been raised in either proceeding.

As we said in Gregory v Gregory,803 S.W. 2d 242(Tenn. App. 1990) the defense must be pled and the party raising the defense must prove it. To carry the burden,the party must raising the defense must generally put in evidence in the record or a copy of the record in the former case...if the record does not conclusively show that a particular matter was determined in a former in a former proceeding, the party relying on res judicata as a defense must supplement the record by other proof id at 244.

Wr have also searched the record of this Court for evidence on which we could base a decision, but we have only found evidence that Mrs Polyak attempted to appeal a 1983 decision and the appeal was dismissed for lack of final judgment.Therefore, on the basis of what we have before us, we cannot sustain a judgment on the pleadings or a judgment of dismissal for failure to state a claim.On remand the appellees may be able to establish a record showing they are entitled to the relief sought.

The judgments entered in the two cases from the lower court are reversed and the causes are remanded to the Chancery Court of Lawrence for further proceedings. Tax costs on appeal to appellees.

s/Ben H. Cantrell Prdsiding Judge

CONCUR:
s/William C. Kotch Jr. Judge
s/Patricia J. Cotterell, Judge